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NO. -

ON THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

ALASKA NORTHERN DEVELOPMENT INC.
AN ALASKAN CORPORATION, Petitioner,

v.

ALYESKA PIPELINE SERVICE COMPANY,
A DELAWARE CORPORATION, Respondent.

REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ALASKA

BOYKO, DAVIS AND DENNIS
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November 29, 1983

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ANALYSIS OF RESPONDENT'S OPPOSITION

In its opposition brief, respondent made two basic arguments:

(1) No federal statutory or constitutional issues, "were ever raised or briefed by the parties or passed upon by the state courts", on either the tariff manipulation or jury trial issues.

(2) These issues were properly decided on the merits by the Alaska Supreme Court.

REBUTTAL ARGUMENT

THESE ISSUES WERE RAISED AND BRIEFED IN THE COURTS BELOW:

(a) TARIFF MANIPULATION SCHEME

On page 2e in appendix "E" of our petition, there is an excerpt from petitioner's December 12, 1980 trial brief. Therein, we specifically argued that the reason for the pipeline company's arbitrary veto of the lucrative December 11, 1976 letter of intent agreement, was in furtherance of Alyeska's scheme to 'Artifically inflate

the costs of construction of the Trans-Alaska Pipeline System in order to improperly and unfairly recover from the public, not only such wantonly inflated costs of construction, but also PROFITS as a consequence of such losses.

...that the cost of transporting oil through the Alyeska Pipeline directly impacts the DOE establishment of maximum well-head oil prices under Section 401 of the Energy Policy and Conservation Act, 89 Stat. 941-46."

The same argument was made before the Alaska Supreme Court on pages 55-60 of Petitioner's 5 May 1982 brief filed with that court.

In Connecticut v. Johnson 103 S.Ct. 969, 974, 74 L.Ed.2d 823, 830 (1983), this court reaffirmed its earlier decision in Brown v. Ohio 87 S.Ct. 2221, 53 L.Ed.2d 187 (1977) holding that where a state court's interpretation of its own law infringes on a federal right, this court will review it and not be bound by the state's interpretation. See also Street v. New York

394 U.S. 576, 22L.Ed. 2d 572, 579 where this court said, "The issue whether a federal question was sufficiently and properly raised in the state courts is itself ultimately a federal question, as to which this court is not bound by the decision of the state courts."

In this case, - despite the issue being timely raised and briefed before both lower courts - the Alaska Supreme filed to even discuss the alleged violation of the federal Energy Policy and Conservation Act of 1975. Both Connecticut and Brown impliedly hold that such an omission does not preclude this court from assuming jurisdiction and considering such issues.

(b) JURY TRIAL ISSUE

Respondent argues petitioner never asserted a violation of its Seventh Amendment right to a jury trial on the issue of contract formation.

On page 4 of its opposition brief, respondent cited various decisions of this court in support of the general proposition that this court as a matter of policy will follow the interpretation of state laws or constitution by its highest court.

What the respondent failed to address however, is our underlying argument that the Alaska Supreme Court in two of its most recent decisions - Shope v. Sims, 658 P.2n 1336 (Alaska 1983) and Alaska Northern Development, Inc. v. Alyeska Pipeline Service Co., 666 p.2d 33, FN.8 (Alaska 1983), adopted as its own, this court's decision in Beacon Theaters v. Westover, 395 U.S. 500, 3 L.Ed.2d 988 (1950). That court therefore bound itself to follow Beacon.

Beacon held that a case involving both legal and equitable claims must be first tried before a jury. In this appeal, it has been established that after granting summary judgment to the respondent on the contract formation issue - despite the existence of disputed issues of material facts - the trial court over the petitioner's objections conducted a six-week non-jury reformation trial. Upon its conclusion, the trial judge resolved substantive issues of disputed facts in respondent's favor on the contract formation issue.

This action clearly contravenes this court's decision in Beacon and its own decision in Shope and effectively deprives petitioner of its right to a jury trial under both the Alaska and Federal Constitutions.

By adopting Beacon's rationale in interpreting the Seventh Amendment as its own interpretation of almost the identical provision in Article I, Section 16 of Alaska's Constitution, the Alaska Supreme Court brought itself within the holding of this court in South Dakota v.Neville 74 L.Ed.2d 748 (1983). In that case, the South Dakota Supreme Court ruled that a violation of its own constitution automatically constituted a violation of the similar Fifth Amendment to the United States Constitution. On that premise, this court granted certiorari based upon the following reasoning: " 'since the Fifth Amendment of the U.S. Constitution is broad enough to exclude this evidence, there is no need to draw a distinction at this time between SD Const. Art VI, Sect. 9 and the Fifth Amendment of the U.S. Constitution.' Ibid. The court could not

have stated more clearly that it simply assumed that any violation of the Fifth Amendment privilege also violated, without further analysis, the state privilege. This was precisely the reasoning we found sufficient in PROUSE to give us jurisdiction to hear the case and decide the federal consitutional issue."

Further, in FN. 5 in Neville at 74 L.Ed.2d page 754, this court analyzed the Prouse case as follows, "The analysis of the court below was remarkably similar to that of the state court opinion reviewed in Delaware v. Prouse, 440 U.S. 648, 651-653, 59 L.Ed.2d 660, 99 S.Ct. 1391 (1979). That state court opinion analyzed various decision interpreting the Federal Constitution, concluded that the Fourth Amendment violated the police procedure at issue there, and then summarily held that the State Consititution was therefore also infringed. As we characterized their analysis, every police practice found to violate the Fourth Amendment would, without further analysis, be held to be contrary to the State Constitution as well. In such a situation,

we concluded, this Court has jurisdiction to review the federal constitutional issue decided below."

In this case, both lower courts violated the petitioner's right to a jury trial. First, by increduously granting summary judgment to respondent after first granting summary judgment to the petitioner. This was done in the face of existing disputed issues of material fact on contract formation. These disputed facts--along with the undisputed ones favoring petitioner - were found to exist by the trial court itself.

Appendix "A" contains Trial Judge Singleton's exact words and reasons -- delivered in open court on March 19, 1980 -- for granting petitioner partial summary judgment on the contract formation issue. Increduously, six months later, in September, 1980, the trial judge, sua sponte, reversed himself. Without the request of either counsel, he set aside said partial summary judgment, resurrected and granted respondent's previously denied motion for summary judgment -

also on the contract formation issue. After the January, 1981 non-jury reformation trial, he made factual findings adverse to Petitioner, also on the contract formation issue. He then utilized these findings of fact to reaffirm his September 1980 grant of summary judgment to the respondent.

An objective reading and analysis of Judge Singleton's verbatim remarks must surely leave one with the firm conviction there are, at the very least, disputed issues of material facts remaining on the contract formation and tariff manipulation issues. The Alaska Supreme Court deprived petitioner of its constitutionally guaranteed right to a jury trial on the same.

CONCLUSION

For these reasons and because said issues were timely raised and briefed below and erroneously decided by the Alaska Supreme Court, this Court has jurisdiction to grant certiorari.

DATED this 29th day of November, 1983.

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APPENDIX A

TRIAL JUDGE SINGLETON'S VERBATIM REMARKS MADE IN OPEN COURT ON MARCH 9, 1980:

"First of all, I want to commend counsel, both teams, for I think, very complicated materials. I think that after reviewing all the information, listening to and evaluating the final oral arguments, it seems to me that the following conclusions are appropriate:

First of all, I think the parties did have a contract. I think that Rickett had authority to enter into the contract he entered into. I think that to the extent that there was a limitation on his authority, he incor-porated that limitation into the contract. That limita-tion was subject to the owner committee approval. Now, lest I be accused of giving with one hand and taking away with the other, the "subject to" language does not preclude the finding of a contract. It doesn't preclude the finding of a meeting of the minds. It simply holds out a possibility that may or may not come

to pass and the possibility is that the committee will for good cause reject a particular offer. What then are good causes that would justify that rejection? Plaintiff contends that the only good cause would be dissatis-faction with the price. I think Mr. Flynn is correct that the structuring of the offer in the first right of refusal way is another item which a jury might find to legitmately lead the committee to reject the contract. Perhaps not. I think that's a fact question. Thirdly, concern by the committee about plaintiff's ability to perform I think is a legitimate area of concern and one that the jury might find would be a legitimate basis for rejecting the contract. In saying that, I haven't gotten into, because I think it's an open issue that the parties are in the process of briefing, whether any concern about ability to perform is governed by the assurances provision in the Uniform Commercial Code. That is an issue that is not ripe for decision at this time. It's one that's been broached. It's one that there will be a response to and the Court

certainly will resolve it when it does. But pending resolution of that, it seems to me ability to perform is significant. Why? Well, I think Mr. Flynn is correct that the pick and choose opportunities of the plaintiff might have had significance beyond the things picked and chosen. Certainly in terms of delaying the ultimate disposal of the surplus. So, I think those, without going into great detail or attempting to analyze this matter far beyond what's been done so far, it seems to me these are additional areas that could be considered, so the Court is prepared to instruct the jury that there was a contract, that the contract is reflected in the papers, and that reasonable men could differ regarding precisely what criteria the management committee could utilize in determining whether to accept or reject the contract so long as the jury understands that the rejection must be made in good faith and based upon considerations central to the circumstances. In other words, a jury must be able to find if there were a discharge, that the committee acted with regard to

the subject matter of the surplus activities and not for some other reason. And so the Court is prepared to grant partial summary judgment to plaintiffs to that extent. The issue will still remain open as to whether the committee acted properly in rejecting this contract, either because of concerns about ability to perform or because the first right of refusal might in effect cost them more over the long-run than they were to gain. Let me just eleborate a moment on that. I think the thrust of the dispute between Mr. Flynn and Mr. DeLisio today is a valid one to put to the jury and that is whether 65% of what is picked and chosen is really the conceptual equivalent of as much as they could have gotten marketing the materials in some other way. If the answer is yes, then plaintiffs will probably prevail. If the answer is no, then the de-fendants may prevail. The court will stand in recess.

I would ask that the parties do get together, see if they can get over some time this week after they have had a chance to review the discovery situation and ---

CHUCK FLYNN: Your Honor, could I ask--I've got to confess, I don't fully understand the ramifications to your ruling. Does that mean, for example, when we get to trial we're not going to be able to put on evidence regarding Mr. Rickett's actual lack of authority?

COURT: No, that's correct. The matter of Rickett's authority to enter into the contract he entered into has been established by summary judgment. The court accepting Terwilliger's testimony as the sole indication of the limitation finds that that limitation is consistent with the language used in the contract. When Rickett used the language "subject to owner committee approval", he in effect acknowledged the only evidence of limitation on authority that defendants have been able to come up with and that, in my opinion, resolved the issue.

FLYNN: But that told everyone that he didn't have the authority.

COURT: No, that's inconsistent with contract law. The statement, for example, the provision in a contract subject to approval of X does convey the idea that absent approval of X there is no contract, but it doesn't make the contract a -- it doesn't preclude the contract from existing. Nor does it say anything at all about the ability of the agent to enter into the contract given the approval of X.

FLYNN: If I stated, Mr. Page, Jim Singleton has agreed to sell you his car for $3,000, subject to his approval. That's a contact?

COURT: That would depend on the circumstances, but I -- if the other circumstances were such that you were my authorized agent to act and one could reasonably believe that, then it would seem to me that I wouldn't have put myself in that position of selling that car unless I could think of a good reason not to. The court will stand in recess.

End"